No. 83-2150

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IN THE

Supreme Court of the United States

October Term, 1983

BULK OIL (ZUG), A.G.,

Petitioner,

v.

SUN COMPANY, INC.,
SUN OIL TRADING COMPANY,
SUN INTERNATIONAL, INC., and
SUN INTERNATIONAL LIMITED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS

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Question Presented

The petition presents no issue worthy of review by the Supreme Court. The only question it presents is whether this Court should review the holdings below, which were based on the application of well-settled precedents to the unique facts of this case, that the complaint did not allege a cause of action under the Sherman Act and that there is no implied private right of action under the Export Administration Act of 1979.

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BRIEF OF RESPONDENTS

Respondents Sun Company, Inc. ("Sun"), Sun Oil Trading Company ("SOTC"), Sun International, Inc. ("Sun International"), and Sun International Limited ("SIL") submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed by petitioner Bulk Oil (Zug) A.G. ("Bulk Zug").[1]

1. SOTC, Sun International, and SIL are wholly-owned subsidiaries of Sun.

Opinions Below

The order of the Court of Appeals and the opinion of the District Court have not been published and are therefore reproduced in Appendix A to this Brief.

Jurisdiction

The judgment of the Court of Appeals was entered on February 17, 1984. The Court of Appeals denied Bulk Zug's petition for rehearing on April 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutes Involved

The petition involves section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and sections 8 and 11 of the Export Administration Act of 1979, 50 U.S.C. app. §§ 2407, 2410 (1976, Supp. III 1979 & Supp. V 1981). These statutes are reproduced in Appendix B to this Brief.

STATEMENT OF THE CASE

Preliminary Statement

This action is an effort by an unsuccessful party to an arbitration proceeding in London to launch a collateral attack on the arbitration award under a variety of federal statutes. Bulk Zug, a Swiss company, and SIL, a Bermuda company, were parties to a contract in which SIL agreed to sell British North Sea crude oil to Bulk Zug. The contract contained an arbitration clause. Bulk Zug breached

the contract by nominating an improper destination for the first cargo of oil. After lengthy hearings, the arbitrator found that Bulk Zug had breached the contract, thereby making it liable for substantial damages to SIL.

After losing the arbitration, Bulk Zug commenced this action in the District Court. In order to offset its liability under the arbitration award, Bulk Zug manufactured federal claims against SIL and its affiliated companies. The complaint alleged violations of the Sherman Act, the Export Administration Act and other federal statutes.

The District Court, after carefully reviewing the complaint and the arbitration award, held that Bulk Zug's Sherman Act claim was insufficient as a matter of law. In dismissing the Export Administration Act claim, the District Court thoroughly reviewed the legislative history of the Act and concluded that Congress did not intend to create a private right of action. These holdings were fully consistent with this Court's decisions and those of the Second Circuit and other Courts of Appeal. Recognizing this, the Second Circuit, by summary order, affirmed the dismissal on the basis of the District Court's opinion.

The Facts

A. *The Underlying Contract and Bulk Zug's Breach*

In April 1981 SIL agreed to sell Bulk Zug approximately 7 million barrels of British North Sea crude oil in thirteen liftings over an 18-month period. A key provision of the contract was the destination clause which provided that the crude oil could only be shipped to a destination "in line with [the United Kingdom's] Government policy."

The United Kingdom limited the export of British North Sea crude oil to member countries of the International Energy Agency, the European Economic Community and countries with which the United Kingdom had an existing pattern of trade in North Sea crude oil. Israel was not a member of any of these groups. Thus, United Kingdom policy precluded the direct export of British North Sea crude oil to Israel.[2]

In May 1981, Bulk Zug breached the destination clause of the contract by nominating Haifa, Israel as the destination for the first cargo of oil. SIL passed on the nomination to British Petroleum, the operator of the loading facility in Scotland, which rejected it. SIL ultimately sold the cargo to another buyer at a substantial loss.

B. *The Arbitration and Award*

In July 1981, SIL commenced an arbitration in London against Bulk Zug for the damages it sustained as a result of Bulk Zug's breach of contract. Bulk Zug argued that United Kingdom policy permitted the direct export of British North Sea crude oil to Israel. Alternatively, Bulk Zug argued that if United Kingdom policy precluded such exports, it was unlawful. The arbitrator, after conducting 28 days of hearings and reviewing thousands of exhibits, found in November 1982 that United Kingdom policy precluded the direct export of British North Sea crude oil to

2. SIL had covered its sale to Bulk Zug with a purchase of crude oil from Svenska Petroleum A.B. ("Svenska"), a Swedish company. Svenska, in turn, had covered its sale to SIL of the first lifting of oil with a purchase from British Petroleum, P.L.C. SIL's contract with Svenska, like its contract with Bulk Zug, permitted delivery of the crude oil only in accordance with United Kingdom policy and, therefore, precluded direct export to Israel.

Israel and that Bulk Zug had breached the contract by nominating Haifa.[3] Having bifurcated the issues of liability and damages, the arbitrator later conducted separate hearings on damages and in September 1983 awarded SIL damages of $12.8 million.

C. *The Complaint*

In January 1983, after the arbitrator had rendered his Interim Award, Bulk Zug commenced this action. The complaint alleged four claims, only two of which are involved on this petition. In its first cause of action, Bulk Zug alleged that the defendants, in conspiracy with Svenska, engaged in a group boycott or refusal to deal in violation of the Sherman Act by failing to deliver North Sea crude oil to Bulk Zug for shipment to Israel. The complaint alleged that defendants' refusal to perform under the contract "burdened" and "affected" the flow of crude oil in United States foreign commerce.

Bulk Zug's second cause of action, which was based on the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 ("EAA"), alleged that SIL, by refusing to deliver North Sea crude oil to Bulk Zug for shipment to Israel, had complied with and supported the Arab Boycott of Israel in violation of the EAA.[4]

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3. The arbitrator rendered a 69-page Interim Award in SIL's favor. A copy of the award was attached to Bulk Zug's complaint and its findings were expressly incorporated into the complaint by reference.

4. Bulk Zug also asserted two other causes of action: (a) SIL's and SOTC's allegedly wrongful attachment of crude oil in Italy belonging to Bulk Zug's sister company, and (b) defendants' alleged violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. II 1978). The Second Circuit affirmed the District Court's dismissal of these claims.

D. *The Decisions Below*

The District Court dismissed Bulk Zug's alleged antitrust claim on three independent and sufficient grounds: (1) SIL's failure to deliver crude oil to Bulk Zug was not the product of a group boycott or refusal to deal, but was the result of SIL's lawful exercise of its contractual rights in the face of Bulk Zug's breach of contract; (2) the complaint failed to allege an anticompetitive effect on United States foreign commerce; and (3) the act of state doctrine made it inappropriate for the District Court to adjudicate Bulk Zug's claim.

The District Court also dismissed Bulk Zug's claim under the EAA. After a thorough analysis of the factors articulated in this Court's decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), particularly the legislative history of the EAA, the District Court concluded that there is no implied private right of action under the Act.

On appeal, the Second Circuit affirmed the District Court's decision by summary order.

ARGUMENT

This Court should not grant certiorari here. The District Court's well-reasoned opinion, which was adopted by the Second Circuit, follows the decisions of this Court and those of the various Courts of Appeal. There is no conflict in the Circuits or other reason which would warrant review by the Supreme Court.

With respect to the Sherman Act claim, Bulk Zug does not seek review of the District Court's first ground for dismissal, that the cause of action is legally insufficient on its face. Thus, there is no need for this Court to review the District Court's alternative grounds for dismissal.

In deciding that the complaint failed to allege that defendants' conduct had an anticompetitive effect on United States foreign commerce, the District Court properly relied on the Second Circuit's decision in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). The holding in *Interbank* is wholly consistent with the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), as well as with the "intended effects" test first enunciated in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

As an alternate ground for dismissal, the District Court correctly applied the act of state doctrine articulated in this Court's decisions in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976). The District Court found that, in order to adjudicate Bulk Zug's alleged Sherman Act claim, it would be required to decide the validity of United Kingdom policy under the United States antitrust laws, the very type of inquiry which the act of state doctrine was designed to avoid.

The District Court's holding that there is no implied private right of action in the Export Administration Act was based on a meticulous application to this statute of the

factors outlined in *Cort* v. *Ash*, 422 U.S. 66 (1975). Congressional intent, as revealed in the legislative history, is the paramount factor in deciding whether a private remedy should be implied. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 377-78 (1982); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979). The legislative history of the EAA conclusively establishes that Congress did not intend to create a private right of action. There is no suggestion that the District Court relied on improper factors or ignored relevant evidence in deciding this issue, nor has another Court of Appeals reached a contrary decision.[5]

I.

There Is No Conflict Among the Circuits on the Jurisdictional Requirements for Extraterritorial Application of the Sherman Act.

The District Court based its holding that it lacked subject matter jurisdiction of Bulk Zug's antitrust claim on the Second Circuit's decision in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). Bulk Zug argues that *Interbank* conflicts with the Ninth Circuit's decision in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

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5. The *amicus curiae* brief of the Anti-Defamation League of B'nai Brith does not present any additional support for this Court's exercise of certiorari jurisdiction. The *amicus* brief merely summarizes the history of the Arab boycott of Israel and argues that the boycott is contrary to the law and policy of the United States, an issue which is not in dispute here. The ADL brief contains no fresh insight into the legislative history of the EAA or the relevant cases which would support the finding of a private right of action under the statute.

An analysis of the two decisions establishes that there is no real conflict between them. In *Interbank*, the Second Circuit held that, in order to exercise jurisdiction under section 1 of the Sherman Act, a District Court must determine "whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States." 666 F.2d at 8.

In *Interbank*, plaintiff had failed to show that defendant's conduct, an alleged conspiracy to restrain trade in the bank credit card market in Canada, was "at all likely to have an anticompetitive effect upon American commerce, either foreign or interstate." *Id.* The Court noted:

> Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction.

Id.

Applying *Interbank* to this case, the District Court found that the complaint involved a completely foreign transaction with no nexus to the United States and that the complaint, although asserting in conclusory terms that defendants' conduct had "burdened" United States commerce, did not allege that such conduct had any anticompetitive effect here. *See* App. A at 5a-7a.

The Ninth Circuit, in deciding *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir.

1976), articulated a three-part test for determining whether the Sherman Act applies to extraterritorial conduct: whether there is some effect—either actual or intended—on American foreign commerce; whether the effect is "sufficiently large to present a cognizable injury to the plaintiffs"; and whether the interests of the United States are sufficiently strong vis-á-vis other nations to justify the assertion of jurisdiction by an American court. *Id.* at 613.

Bulk Zug claims that the *Timberlane* "actual or intended effects" test, unlike the test in *Interbank*, does not require a showing of an anticompetitive effect. *See* Petition for a Writ of Certiorari at 8-9. The distinction which Bulk Zug attempts to draw between these two decisions is illusory. Although the court in *Timberlane* did not expressly find that the complaint alleged an anticompetitive effect, it was apparent that the claimed restraint, a conspiracy to prevent the exportation of lumber from Honduras into the United States (549 F.2d at 601), would have had such an impact. Such conduct, if proven, would clearly be anticompetitive. Thus, it was not necessary for the Ninth Circuit, in formulating its test, expressly to require an allegation that the restraint had an anticompetitive effect on United States foreign commerce; such an effect was implicit in the restraint alleged. Indeed, the Court emphasized that the "Sherman Act reaches restraints directly intended to *limit* the flow of interstate trade or whose sole impact is on interstate commerce, but it also reaches 'wholly local business restraints' if the particular restraint 'substantially and adversely affects interstate commerce.' " *Id.* at 612 (citations omitted) (emphasis added).

In arriving at its test, the Ninth Circuit rejected as inadequate other tests that focused only on the "directness"

or "substantiality" of the effect on United States foreign commerce. *See* 549 F.2d at 610-13. There is no question, however, that the alleged effect must be an anticompetitive one in order for the Sherman Act to apply. *See United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (Learned Hand, J.) ("any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders *which the state reprehends*" (emphasis added)); *see also In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253 (7th Cir. 1980); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1291 (3d Cir. 1979) ("Acts and agreements occurring outside the territorial boundaries of the United States *that adversely and materially affect* American trade are not necessarily immune from United States antitrust laws." (emphasis added)).

On the remand of *Timberlane*, the District Court quoted with approval *Interbank's* language regarding the need for an anticompetitive effect on United States commerce to support an assertion of Sherman Act jurisdiction. *Timberlane Lumber Co.* v. *Bank of America National Trust & Savings Association*, 574 F. Supp. 1453, 1463 (N.D. Cal. 1983). The *Timberlane* District Court stated that a "critical factor" was whether the plaintiffs could demonstrate that the defendants' conduct was "intended to, or did, have an *anticompetitive effect* upon a relevant geographic and product market in the United States." *Id.* at 1464 (emphasis added). The *Timberlane* District Court held that, under the Ninth Circuit's "jurisdictional rule of reason," the "extraterritorial application of the Sherman Act is inappropriate in this case." *Id.* at 1465.

Thus, the *Timberlane* District Court, in resolving the jurisdictional issue, relied on both the Ninth Circuit's *Timberlane* decision and the Second Circuit's decision in *Interbank*. In light of the foregoing, Bulk Zug's suggestion that there is a conflict between *Timberlane* and *Interbank* is unfounded.

II.

The Courts Below Properly Followed This Court's Decisions in Applying the Act of State Doctrine.

The courts below found that the litigation of this action would require the District Court to adjudicate the validity, under the Sherman Act, of official British policy concerning the export of North Sea crude oil. Such a decision, the District Court held, was "precisely the type of inquiry the Act of State doctrine is supposed to bar" and therefore adjudication of Bulk Zug's antitrust claim was "inappropriate." App. A at 8a. The District Court's decision is fully in accord with this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), as well as with the principles underlying the act of state doctrine. Thus, there is no basis for the grant of certiorari.

The District Court found, based on the arbitrator's award, that the official statements of British ministers in Parliament, particularly those of the Minister of Energy, constituted the policy of the United Kingdom. App. A at 7a-8a. That policy precluded direct export of British North Sea crude oil to Israel. The ministers' statements of policy were sufficient "acts" to satisfy the requirement that the act

of state doctrine apply to public acts by a foreign sovereign in the exercise of its sovereign authority. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 401; *Underhill* v. *Hernandez*, 168 U.S. at 252; *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Dominicus American Bohio* v. *Gulf & Western Industries*, 473 F. Supp. 680, 689 (S.D.N.Y. 1979).

Bulk Zug contends, citing cases which involved formal governmental acts such as expropriation, that the act of state doctrine only applies to "concrete and substantial" acts, not intangible "acts" such as statements of policy. Petition for a Writ of Certiorari at 11. This Court's decisions and those of the Courts of Appeal do not support such a narrow reading of the doctrine. Nor is there any suggestion that the decisions below depart from established precedent in this area.

The act of state doctrine requires a "flexible approach," a "critical element" of which is "the potential for interference with our foreign relations." *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984). Its applicability "is not subject to clear definition." *International Association of Machinists & Aerospace Workers (IAM)* v. *OPEC*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

In *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, the Ninth Circuit held that the act of state doctrine applied to allegations that defendants secured a foreign off-shore oil concession through anticompetitive conduct. The Court stated that "judicial scrutiny of sovereign de-

cisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy." 712 F.2d at 407.

The same rationale applies here. Adjudication of the antitrust claim in this case would have required the District Court to determine the validity, under the Sherman Act, of United Kingdom policy concerning the export of British North Sea crude oil. Here, no less than in *Clayco*, such a decision would have involved "judicial scrutiny of sovereign decisions allocating the benefits of oil development" and would "embarrass the political branches of our government in the conduct of foreign policy." *See id.*

Although this case involved the oil export policy of a foreign sovereign rather than its oil development policy, the fundamental principle that our courts should not embroil themselves in the public acts of foreign sovereigns remains the same. The courts below, upon reviewing the arbitrator's exhaustive analysis of British policy, correctly followed established Supreme Court precedent and found that the adjudication of Bulk Zug's antitrust claim would not be appropriate.

III.

This Court Should Deny Bulk Zug's Petition to Review Whether There Is an Implied Private Right of Action Under the Export Administration Act.

Bulk Zug contends that this Court should review the decision below that there is no implied private right of action under the Export Administration Act. Bulk Zug has not identified any ground for invoking this Court's discretion-

ary certiorari jurisdiction on this issue. *See* Sup. Ct. R. 17.1. The decision below does not conflict with the decision of any other federal court of appeals or state court of last resort. *See* Sup. Ct. R. 17.1(a)-(b). The only other court which has ruled on this issue is a District Court in Texas. *See Abrams* v. *Baylor College of Medicine*, 581 F. Supp. 1570 (S.D. Tex. 1984). Any conflict between the District Court's decision and that of the Second Circuit does not warrant Supreme Court review.

Nor is there any suggestion by Bulk Zug that the issue of whether there is any implied private right of action under the EAA is an important unsettled question of federal law which must be decided by this Court. The circumstances under which a private right of action should be implied from a federal statute have been the subject of numerous recent Supreme Court decisions. The relevant factors are well established and readily applied by the lower courts. *See, e.g., Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Cort* v. *Ash*, 422 U.S. 66 (1975).

In *Cort* v. *Ash*, 422 U.S. 66 (1975), this Court identified four factors for lower courts to consider in determining whether to imply a private right of action from an otherwise silent statute. These four factors are: (1) whether the plaintiff is " 'one of the class for whose especial benefit the statute was enacted' "; (2) whether the legislative history of the statute demonstrates an intent to create or to deny such a right; (3) whether implying a private remedy would be consistent with the statute's regulatory scheme; and (4) whether the cause of action is one that is "tradition-

ally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78 (emphasis omitted) (quoting *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39 (1916)). This Court has held that legislative history is the paramount factor in deciding whether to imply a private right of action. *See, e.g., Daily Income Fund, Inc. v. Fox*, 104 S. Ct. 831, 839 (1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

The language of the EAA establishes that Congress did not intend to create a private right of action for violations of the Act. There is no mention in the statute of a private remedy.[6] Congress expressly entrusted enforcement of the EAA to the Government. The Act grants to the President the authority to promulgate regulations prohibiting actions taken with intent to comply with, further, or support a foreign boycott. 50 U.S.C. app. § 2407(a)-(b) (Supp. III 1979). The Government can enforce the EAA against violators by bringing actions for criminal or civil penalties, *id.* § 2410(b), (f), or by imposing administrative sanctions, *see id.* § 2410(c).

The legislative history of the EAA persuasively demonstrates that Congress did not intend to create a private right of action. Although the 1976 House antiboycott bill

6. When Congress amended the Act in 1977, it explicitly added another remedy to the existing sanctions for violations: the suspension of export privileges. Pub. L. No. 95-52, § 203(a), 91 Stat. 235 (1977). If Congress had intended to add a private right of action to the existing remedies, it would have done so expressly. *See Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

contained an explicit private right of action, including the right to recover treble damages and attorneys' fees, H.R. 15377, 94th Cong., 2d Sess. § 14(c)(1), 122 Cong. Rec. 31952 (1976), the Senate version of the same legislation did not contain a private right of action, *see* S. 3084, 94th Cong., 2d Sess., 122 Cong. Rec. 28248 (1976); *see also* Conference Comparative Print Showing Senate Bill S. 3084 and the House Amendment Thereto, Conf. Doc. No. 76-612, 94th Cong., 2d Sess. (1976). Nor did the bill that emerged from the conference committee. Conf. Rep., 94th Cong., 2d Sess. (to accompany S. 3084).

The conference bill was not enacted in 1976. It was reintroduced in both the House and the Senate in 1977 without any provision for a private right of action, and was enacted without such a provision later that year. *See* Export Administration Act of 1977, Pub. L. No. 95-52, 91 Stat. 235. Other congressional efforts during this period to create a private right of action for compliance with foreign boycotts also failed.[7] In all, Congress has consistently and explicitly rejected private remedies under the EAA.[8]

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7. In 1975, 1976 and 1977, Rep. Holtzman (D.-N.Y.) introduced bills that provided for a private right of action against those who complied with and those who coerced compliance with foreign boycotts; against the former, single damages would have been available; against the latter, treble damages, plus attorneys' fees would have been available. H.R. 5246, 94th Cong., 1st Sess. § 246(d)-(g) (1975); H.R. 12383, 94th Cong., 2d Sess. § 246(d)-(g) (1976). In 1976, Rep. Hutchinson (R.-Mich.) introduced a bill providing for a private single damage remedy against those who coerced compliance with a foreign boycott. H.R. 11488, 94th Cong., 2d Sess. § 3(a) (1976); *see also Arab Boycott: Hearings Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. (July 9, 1975 and April 8, 1976). None of these bills was enacted.

8. *See also Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 94th Cong., 2d Sess. 238, 445 (June 8-11, 15, 16; August 10-24, 1976).

A telling indication that Congress consciously rejected the creation of a private right of action is the statement in the Senate report on the bill that ultimately created the antiboycott provisions of the Act that "[t]he danger of unwarranted allegations in this highly sensitive area has prompted the Committee to leave enforcement in the hands of the Executive Branch instead of creating a private right of action." S. Rep. 95-104, 95th Cong., 1st Sess. 22 (1977) (discussing refusals to deal); *see also* 123 Cong. Rec. S13777-78 (daily ed. May 5, 1977) (statement of Sen. Stevenson).

Not only did Congress refuse to create a private right of action in the EAA, it eliminated private rights of action that had existed under state law by enacting a federal preemption provision. 50 U.S.C. app. § 2407(c) (Supp. III 1979); *see Arab Boycott: Hearings on S. 69 and S. 92 Before the Subcomm. on International Finance of the Sen. Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 302-03 (1977). The intentional elimination of private remedies under state law, coupled with the express rejection of private remedies under federal law, precludes the implication of a private remedy here. *See Bradley* v. *School Board*, 416 U.S. 696, 716, n.23 (1974) ("[W]e are reluctant specifically to read into the statute the very . . . limitation that Congress eliminated.").

Since the legislative history of section 2407(a)(1)(A) is dispositive with respect to Congressional intent, the courts below had no need to consider whether Bulk Zug was "one of the class for whose *especial* benefit the statute was enacted." *Cort* v. *Ash*, 422 U.S. at 78 (emphasis in original). The question of whether a statute is intended

to benefit a special class is distinctly different from whether Congress intended the statute to be enforced through private litigation. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 25 (1979) (acknowledging that the Investment Advisors Act of 1940 was intended to benefit persons such as the plaintiff but denying a private right of action); *see also California* v. *Sierra Club*, 451 U.S. 287, 294 (1981) ("[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer rights upon those beneficiaries.").

In any case, the antiboycott provisions were not enacted for the benefit of persons in Bulk Zug's alleged class. Unlike the statutes cited by Bulk Zug that prohibit discrimination, section 2407(a)(1)(A) makes no mention of discrimination.[9] Instead, section 2407(a)(1)(A) simply defines a prohibition that was to be established by the President and enforced by the Secretary of Commerce through the promulgation of regulations.

The purpose of the EAA is "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries *against other countries friendly to the United States or against any United States person.*" 50 U.S.C. app.

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9. *Compare* 50 U.S.C. app. § 2407(a)(1)(A) (Supp. III 1979) *with Cannon* v. *University of Chicago*, 441 U.S. 677, 690 (1979) and *Guardians Association* v. *Civil Service Commission of City of New York*, 103 S. Ct. 3221 (1983) ("No person . . . shall . . . be excluded"); *Consolidated Rail Corp.* v *Darrone*, 104 S. Ct. 1248 (1984) ("No otherwise qualified handicapped individual . . . shall . . . be excluded"); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) ("No person shall be denied the right to vote"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) ("All citizens of the U.S. shall have the same right"); and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("All persons within the jurisdiction of the U.S. shall have the same right").

§ 2402(5)(A) (Supp. III 1979) (emphasis added). Thus, the class protected by the Act consists of United States persons and countries friendly to the United States. Bulk Zug, a Swiss corporation that does not maintain an office in the United States, does not fall within either group.

Even the only court to have found a private right of action under the EAA, did not suggest that the Act protects persons in Bulk Zug's class. *See Abrams* v. *Baylor College of Medicine*, 581 F. Supp. 1570, 1581 (S.D. Tex. 1983). The District Court defined the "especial class" of persons protected by section 2407(a)(1)(B), the discrimination provision of the antiboycott amendments, as American Jews. *Id.* Bulk Zug is not a member of that class, nor is it a "United States person." 50 U.S.C. app. § 2407(a)(1)(B) (Supp. III 1979).

There is no basis for Bulk Zug's claim that there is a "civil rights" exception to this Court's test for determining whether to imply a private right of action. *See* Petition for a Writ of Certiorari at 16. In each of the cases relied on by Bulk Zug, this Court's decision to find an implied private right of action was based on Congressional intent, not the supposed "civil rights" nature of the statute. *See Cannon*, 441 U.S. at 677 (language and legislative history of statute were evidence of Congressional intent to create private right of action); *Guardians Association*, 103 S. Ct. at 3221 (Opinion of White, J.) (Court relied on the *Cannon* Court's analysis of the legislative history of Title IX to find a private right under Title VI); *Darrone*, 104 S. Ct. at 1248 (Court did not reach the private right question; the petition conceded it).

In any event, section 2407(a)(1)(A) is not a "civil rights" statute. The Act provides that it does not supersede or limit the operation of "the antitrust or civil rights laws of the United States," 50 U.S.C. app. § 2407(a)(4) (Supp. III 1979), thus establishing that Congress viewed the EAA's antiboycott provisions as distinct and different from the antitrust and civil rights laws. The Senate Report on S. 69 states that "[b]oth bodies of law [antitrust and civil rights] would in no way be affected by the passage of this legislation." S. Rep. 95-104, 95th Cong., 1st Sess. 47 (1977).[10]

Finally, unlike the statutes in the cases cited by Bulk Zug that clearly prohibit discrimination, section 2407(a)(1)(A) makes no mention of discrimination. *Compare* 50 U.S.C. app. § 2407(a)(1)(A) (Supp. III 1979) *with* the statutes analyzed in *Cannon*, 441 U.S. at 677 (prohibiting sex discrimination), *Guardians Association*, 103 S. Ct. at 3221 (prohibiting discrimination on grounds of race, color or national origin) and *Darrone*, 104 S. Ct. at 1248 (prohibiting discrimination against the handicapped). Nor is section 2407(a)(1)(A) similar to the Civil Rights Act of 1870, cited by Bulk Zug. That Act focuses on the benefited class. 42 U.S.C. § 1981 (1976) ("All persons within . . . the United States shall have the same right. . . .").[11]

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10. *See also id.* at 22 ("[t]he refusal to deal provisions of the bill . . . would neither substitute for nor limit the operation of the antitrust or civil rights laws of the United States"), and *id.* at 39 (civil rights laws of the U.S. characterized as "other statutes").

11. Moreover, Congress expressly provided a private right for violation of the 1870 Act. 42 U.S.C. § 1983 (1976 & Supp. III 1979) ("Every person who . . . subjects . . . any citizen of the United States . . . to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .").

Conclusion

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: August 3, 1984

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the — day of ————, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. J. EDWARD LUMBARD, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. EDWARD D. RE, *Chief Judge,*
*U.S. Court of International Trade**

Nos. 83-7779, 83-7781, 83-7785

BULK OIL (ZUG) A.G.,
Plaintiff-Appellant,

v.

SUN COMPANY, INC., *et al.*,
Defendants-Appellees.

BULK OIL (MILANO) S.R.L.,
Plaintiff-Appellant,

v.

SUN INTERNATIONAL LIMITED and
SUN OIL TRADING COMPANY,
Defendants-Appellees.

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* Sitting by designation.

ORDER

[Filed Feb. 17, 1984]

Bulk Oil (Zug) A.G. appeals from a Memorandum Decision and Order of Judge Charles E. Stewart of the United States District Court for the Southern District of New York, dated August 11, 1983, which dismissed the first, second and fourth claims in plaintiff's complaint and from Judge Stewart's Memorandum Decision and Order, dated August 25, 1983, which dismissed plaintiff's third claim. Bulk Oil (Milano) S.R.L. appeals from Judge Stewart's Memorandum Decision and Order, dated August 11, 1983, which dismissed its complaint.

Now, after due consideration, we affirm the judgments entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 2nd day of September, 1983, substantially for the reasons set forth in Judge Stewart's three Memorandum Decisions and Orders.

/s/ J. Edward Lumbard
HON. J. EDWARD LUMBARD

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ Edward D. Re
HON. EDWARD D. RE

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

83 Civ. 741 (CES)

BULK OIL (ZUG) A.G., a Swiss Corporation,

Plaintiff,

— against —

SUN COMPANY, INC., a Pennsylvania Corporation, SUN OIL TRADING COMPANY, a Delaware Corporation, SUN INTERNATIONAL, INC., a Delaware Corporation, and SUN INTERNATIONAL LIMITED, a Bermuda Corporation,

Defendants.

MEMORANDUM DECISION

STEWART, District Judge:

This case concerns a contract between plaintiff Bulk Oil (Zug) A.G. ("Bulk (Zug)") and defendant Sun International Ltd. ("SIL") for a supply of North Sea crude oil. Also named as defendants are Sun Company, Inc. ("Sunoco"), Sun Oil Trading Company ("SOTC") and Sun International, Inc. ("SII"). Occasionally we may refer to the defendants collectively as "Sun".

Plaintiff claims that SIL's refusal to deliver the oil contracted for violated section 1 of the Sherman Act, the Export Administration Act, and the Racketeering Influenced and Corrupt Organizations Act. In addition, plaintiff seeks recovery for defendants' alleged wrongful attachment

of property of an affiliate of plaintiff, Bulk Oil (Milano) S.r.l. Defendants move to dismiss all claims. As many of the facts of this case have been reported in the Interim Award of the Arbitrator in London dated October 8, 1982 (which is annexed as Exhibit A to the Complaint), we will not restate them here, but will develop them in our discussion of the various points of defendants' motion.

I. Antitrust Claim

Plaintiff alleges that defendants' refusal to deliver the oil violated section 1 of the Sherman Act. Specifically, plaintiff alleges that the defendants' refusal to deliver constituted a combination and conspiracy "to comply with, further, and support the Arab Boycott of Israel by refusing to deliver crude oil contracted for by plaintiff and similarly situated companies for delivery to Israel". Complaint ¶ 71. We grant defendants' motion to dismiss this claim because we find defendants' refusal to deliver was neither a "refusal to deal" nor a boycott. We further find we lack subject matter jurisdiction over this claim, and that the Act of State doctrine precludes adjudication of this claim.

The contract between Bulk (Zug) and SIL called for SIL to deliver "certain quantities of United Kingdom North Sea crude oil for the price and in accordance with the terms set forth in that contract". Complaint ¶ 35. As the Arbitrator's Interim Award indicates, the contract contained a "Destination Clause" which read:

> Destination Free but always in line with exporting country's Government policy.
>
> United Kingdom Government policy, at present, does not allow delivery to South Africa.

Interim Award at ¶ 34. As the Arbitrator further found, in 1981, U.K. Government policy "precluded the direct export of North Sea crude to Israel". *Id.* at ¶ 53. Bulk Zug's nomination of Haifa as the oil's destination thus constituted a breach of contract that relieved SIL of its obligations under the agreement. *Id.* at ¶¶ 61, 148. *See also* Final Award at ¶ 7. SIL's refusal to deliver the oil therefore was a lawful exercise of its rights under the law of contract, not a violation of the antitrust laws.

Even if SIL's failure to deliver the oil could be construed as a boycott or refusal to deal for the purposes of the antitrust statute, we find we lack jurisdiction to hear this claim under *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). In *Interbank*, the Second Circuit stated that the proper test of jurisdiction in cases alleging extraterritorial violations of the antitrust laws was "whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States". *Id.* at 8. In stating this test, the Second Circuit specifically rejected the Ninth Circuit's test for jurisdiction in such cases as stated in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977).[1] *Timberlane's* test, the Second Circuit noted, could "lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anti-

1. *Timberlane* set a "tripartite test of (1) a restraint affecting or intended to affect foreign commerce of the United States, (2) a restraint of sufficient magnitude to 'present a cognizable injury' to the plaintiff, and (3) the propriety of asserting extraterritorial jurisdiction as a matter of international comity and fairness." *Interbank*, 666 F.2d at 8.

competitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete". *Id.*

In this case, plaintiff has alleged the following effects in the Complaint at paragraph 73:

(a) the flow of crude oil in the foreign trade and commerce of the United States has been burdened by the defendants' compliance with Arab Boycott;

(b) the availability of crude oil in the United States has been affected by defendants' compliance with the Arab boycott;

(c) plaintiff has been deprived of the benefits of free and open competition; and

(d) plaintiff has been injured in its business by defendants' compliance with the Arab Boycott.

Paragraph 73(b), (c) and (d) do not state effects sufficient to confer subject matter jurisdiction under *Interbank* since none of them allege anticompetitive effects on United States commerce. Read alone, paragraph 73(a) appears to be a sufficient statement of anticompetitive effects, but we find this conclusion undercut by other information contained in the complaint. As a preliminary matter, the transaction in question here was a contract between a Swiss company (¶ 4) and a Bermuda corporation (¶ 6) to deliver North Sea oil (¶ 35) to an Israeli customer (¶ 56). The suppliers of the oil were Swedish (¶¶ 20, 58) and British (¶¶ 20, 60). These facts alone suggest a most tenuous connection to United States commerce. More significantly, however, defendants' non-delivery of the oil to plaintiff in fact resulted in eight of thirteen cargoes being delivered to the United States. ¶ 54. As counsel conceded at oral argument, the net result of defendants' non-delivery was to increase the supply of crude oil in the United States, and

thus the actual effect in the United States was pro-competitive. On this record, we cannot conclude that subject matter jurisdiction exists under *Intercard*'s standard.

Plaintiff does not elaborate upon any of these alleged effects in its papers in opposition to this motion. Rather, it argues that jurisdiction is proper under *Interbank* because the anticompetitive effects of a group boycott are presumed as a matter of law, citing *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (which cites, in turn, *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941)). *Northern Pacific* and *Fashion Originators' Guild* do state that group boycotts are *per se* violations of the antitrust laws, not subject to a rule of reason analysis. They do not say, however, that any boycott, anywhere, is presumed to have anticompetitive effects in the United States.[2]

We also find that plaintiff's claim raises substantial Act of State problems that render adjudication inappropriate. The Act of State doctrine precludes judicial inquiry into "the validity of the public acts of a recognized foreign sovereign power committed within its own territory". *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). In this case, the contract between Bulk and Sun was specifically pegged to "U.K. policy". U.K. policy, as stated by the British Secretary of State for Energy, precluded direct sales of North Sea oil to Israel. Interim Award at ¶¶ 40-48. To hold defendants in violation of the United States antitrust laws would thus seem to

2. Neither *Northern Pacific* nor *Fashion Originators* would seem to have the occasion to produce such a holding. *Northern Pacific* was actually a tying case; its reference to group boycotts appears in a string cite of cases that held certain practices *per se* violations. *Fashion Originators* was a boycott case, but the boycott does not appear to have extended beyond United States borders.

require an inquiry into the validity of official British policy. This is precisely the type of inquiry the Act of State doctrine is supposed to bar.

Plaintiff argues that the Act of State doctrine should not apply here because the British ministers' statements do not constitute formal governmental acts. Plaintiff cites the following language from *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F.Supp. 680, 689 (S.D.N.Y. 1979) in support of its argument:

> In order to trigger application of the act of state doctrine, the government act concerned must be a public one such as *legislative enactment, regulatory decree*, or executive use of the police powers.

(emphasis supplied by plaintiff). It is not entirely clear to us that U.K. policy as expressed by Secretaries of State in response to inquiries by members of Parliament does not constitute "executive use of the police powers", mentioned in *Dominicus*, but not underscored by plaintiff. At any rate, the use of the phrase "such as" in the quoted passage suggests that the listing was not intended to be exhaustive.[3]

The more relevant inquiry appears to be whether the defendants' acts were compelled by the acts of a foreign sovereign. *See Timberlane*, 549 F.2d at 606[4] (quoting

3. Indeed, the Supreme Court has defined the doctrine as applying to "public acts a recognized foreign sovereign power committed within its own territory", *Banco Nacional de Cuba*, 376 U.S. at 401, and "acts done within their own States, in the exercise of governmental authority". *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976).

4. In *Interbank*, the Second Circuit expressly declined to "question[] the pertinence of" *Timberlane's* test of "international comity and fairness" as a prerequisite for the exercise of extraterritorial jurisdiction. 666 F.2d at 8. (See note 1, *supra*.)

Intramerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291, 1298 (D. Del. 1970) ("When a nation compels a trade practice that firms there have no choice but to obey, acts of business become effectively acts of the sovereign")). With respect to this point, plaintiff asserts that the U.K.'s policy did not compel defendants' refusal to deliver crude oil to plaintiff since "defendants were always free to supply plaintiff with oil from a source other than the North Sea". Memo in Opp. at 35. Inasmuch as plaintiff alleges in its complaint, however, that the contract was one for the sale of "certain quantities of United Kingdom North Sea crude oil", ¶ 35, it would appear defendants had no obligation under the contract to do so.

Plaintiff also asserts that the defendants were not bound by the U.K. policy because the policy was enforced only sporadically. However, plaintiff undercuts the strength of this argument with its statement: "*So long as violations were not made blatantly public*, noncompliance was largely ignored by the United Kingdom's Department of Energy". Memo in Opp. at 34. Yet it was precisely plaintiff's nomination of Haifa that made the noncompliance attempted here public, and that disabled the defendants from performing.

For all these reasons, therefore, we grant defendants' motion to dismiss plaintiff's antitrust claim.

II. Export Administration Act Claim

Bulk also claims that Sun's refusal to deliver the oil contracted for violated the antiboycott provisions of the Export Administration Act, 50 U.S.C. App. § 2407 et seq. (Supp. III 1979). Sun argues (1) that no private right of action exists under this statute, and (2) even if one

does, the statute was not violated. We agree that no private right of action exists under the Export Administration Act, and grant defendants' motion to dismiss this claim.

The Export Administration Act of 1979 ("the Act") directs the President or his delegate to issue regulations prohibiting certain actions taken with intent to comply with, further, or support a foreign boycott. 50 U.S.C. App. § 2407. Violators are subject to criminal and civil penalties and administrative sanctions pursuant to § 11 of the Act. *Id.* § 2410(a)-(c). Actions for the recovery of penalties may be brought in the name of the United States. *Id.* § 2410(f). The statute does not contain any reference to a private right of action to enforce its substantive provisions. Since the statute clearly lacks an express private right of action, the question this motion presents is whether one may be implied.

Cort v. Ash, 422 U.S. 66, 78 (1975) set out four factors to be considered in determining whether a private remedy is to be inferred under a statute not expressly providing for one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

More recent cases have indicated that the greatest weight is to be given to the second factor, congressional intent.

E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377-78 (1982). *Merrill Lynch* further counsels that "the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perceptions of the law that it was shaping or reshaping." At 378.

At this point, a review of the history of the Act may be helpful. The Act was first adopted in 1949. The original statute was directed at controlling the export materials in short supply and with "potential military significance". 63 Stat. 7 (1949). The Act allowed the President to promulgate regulations prohibiting the exportation of designated materials. *Id.* § 3. Violations were punishable by fine and/or imprisonment. *Id.* § 5.

In 1965, the Act was amended to add a statement that it was the policy of the United States to oppose restrictive trade practices or boycotts. P.L. 89-63, 79 Stat. 209 (1965). The President was given authority to promulgate appropriate regulations to implement this policy. The 1965 amendments added civil penalties in addition to the penal sanctions contained in the 1949 Act. The new civil penalty sections read as follows:

> (c) The head of any department or agency exercising any functions under this Act, or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $1,000 for each violation of this Act or any regulation, order, or license issued under this Act, either in addition to or in lieu of any other liability or penalty which may be imposed.
>
> (d) The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to be granting restoration, or continuing

validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed.

(e) Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within two years after payment, on the ground of a material error of fact or law in the imposition. Notwithstanding section 1346(a) of title 28 of the United States Code, no action for the refund of any such penalty may be maintained in any court.

(f) In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon the United States in any way unless it has previously been reduced to judgment.

(g) Nothing in subsection (c), (d), or (f) shall limit—

(1) the availability of other administrative or judicial remedies with respect to violations of this Act or any regulation, order, or license issued under this Act,

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act or any regulation, order, or license issued under this Act, or

(3) the authority to compromise, remit, or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)).

In 1976, there was an effort to amend the Act further. A bill that passed the House contained an explicit private right of action for treble damages:

> A United States person aggrieved by action taken as a result of a violation of section 4(k)(2) of this Act may institute a civil action in an appropriate United States district court, without regard to the amount in controversy, and may recover threefold actual damages, reasonable attorney's fees, and other litigation costs reasonably incurred, and obtain other appropriate relief.

H.R. 15377, 94th Cong., 2d Sess. § 6(g) (1976). The companion Senate version of the same legislation did not contain a comparable provision, however. *See* S. 3084, 94th Cong., 2d Sess. (1976). No final version was adopted that year.

In 1977, a new bill without the treble damage provision was introduced and passed in both the House and the Senate. P.L. 95-52, 91 Stat. 235 (1977). The 1977 amendments were specifically aimed at taking a "stronger stand" on the problem of the Arab boycott of Israel and its impact on United States business. The 1977 amendments thus added a new section requiring the President to issue rules and regulations prohibiting any United States persons from:

> taking or knowingly agreeing to take any of the following actions with intent to comply with, further or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States: (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, . . . or with any other person pursuant to an agreement with, . . . or a request from or on behalf of the boycotting country. . . .

The 1977 amendments further added as an administrative sanction the revocation of export licenses for violation of the anti-boycott provisions.

In 1979, the amendments of 1977 were incorporated without change into the Export Administration Act of 1979. *See* H.R. Rep. No. 200, 96th Cong., 1st Sess. 3 (1979); P.L. 96-72, 93 Stat. 521 (1979).

Two things strike us as significant in the mass of otherwise unenlightening legislative history of the Export Administration Act. First, as far as our research can determine, it appears that no one has ever attempted to bring any sort of private action under this statute since its adoption in 1949. As follows from this, of course, no court has ever judicially recognized a private right of action under the Act. Against this background, the second point that we deem significant is Congress' failure to adopt an amendment providing for a private right of action as proposed in the House in 1976.

Plaintiff argues, citing *Leist v. Simplot*, 638 F.2d 282 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), that Congress' failure to adopt the private right of action provision proposed in 1976 should not be viewed as evidence of an intent to deny a private right of action since the 1976 proposal also contained a provision for treble damages. We find this case distinguishable from *Leist*, however. *Leist* considered the question of whether a private right of action existed under the Commodity Exchange Act ("CEA") as amended in 1974. In concluding that such a right did exist, Judge Friendly noted "one differentiating factor of . . . transcendent importance": that judicial decisions prior to the 1974 amendments had uniformly upheld the existence of a private right of action, and the 1974 Congress was well aware of the existing state of the law. 638 F.2d at 303. It was this factor that led Judge Friendly to reject arguments

by the defendants and the dissent that Congress' failure to enact bills that had provided for a private right of action for treble damages evidenced a Congressional intent to deny a private right of action. Since a private right of action for simple damages already existed under the CEA, the failure to adopt a treble damage provision could only be construed as an intent to deny treble damages. *See* 638 F.2d at 315 n.38.

In this case, however, no comparable history of judicial implication of a right exists. Unlike *Leist*, and like *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, ("*Amtrak*") 414 U.S. 453 (1974) Congress *was* "operating on a *tabula rasa*", 638 F.2d at 313, when it revised and amended the Export Administration Act. While Congress' failure to enact a private right of action for treble damages in this case is not as strong of evidence of intent to deny a private right of action as was Congress' rejection of a provision providing for suits by any "aggrieved person" in *Amtrak*, we believe this case is closer to *Amtrak* than it is to *Leist*.

Plaintiff further argues that a private right of action should be inferred on the basis of section 11(g) of the Act, 50 U.S.C. App. § 2410(g) (Supp. III 1979). This section provides:

> (g) Other authorities
>
> Nothing in subsection (c), (d) or (f) limits—
>
> (1) the availability of other administrative or judicial remedies with respect to violations of this Act [sections 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix]:
>
> (2) the authority to compromise and settle administrative proceedings brought with respect to viola-

tions of this Act [sections 2401 to 2420 of this Appendix]; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)) [section 401(b) of Title 22].

"Subsection (c), (d) or (f)" as appears in subsection (g) refers to the civil penalty sections added in 1965 (and quoted at page 8, *supra*). Plaintiff argues that the phrase "or judicial remedies" should be construed as providing for a private right of action under the Act. While we believe such a reading of this section is literally possible, we find this interpretation inconsistent with the history and structure of the Act.

The legislative history of the 1965 amendments does not contain the slightest suggestion that a private right of action was intended by adoption of section (g). The discussions of the proposed provisions rather indicate an intention to increase regulatory flexibility. We thus believe the more reasonable reading of subsection (g) is that it confirms that the presence of civil penalties in subsections (c), (d), or (f) in no way limited the *government's* choice of sanctions or actions to enforce the Act.

In hearings on the 1965 amendments, John Connor, Secretary of Commerce, testified before the Committee on Banking and Currency that the "amendment will add some much-needed flexibility to the enforcement of the act, by enabling us to impose an appropriate monetary sanction in certain types of cases for which existing sanctions are not well suited". Continuation of Authority for Regulation of Exports: Hearings Before the Committee on Banking and Currency; 89th Cong., 1st Sess. 5-6 (1965).

Later in those same hearings, Secretary Connor further expounded upon the civil penalty amendments:

> Mr. Cabell. For the record, Mr. Secretary, on page 4 of your testimony you refer to repeated minor violations not warranting cancellation of the license.
>
> Now, are we jockeying ourselves into a position by just imposing a fine to where it would be profitable for the violator just to pay those fines if he is not threatened with cancellation of his license? I have seen that happen in other matters where it is profitable just to go ahead and pay the fine.
>
> Secretary Connor. Mr. Cabell, our intent would be to handle a few repeated minor violations after the warning letter with some kind of civil fine after the procedure that was discussed, but if the offenses continue, then there is no reason at all why we can't proceed to the more serious type of penalties, and this would be our intent. This proposal, in other words, would just give us a broader range of arms in the arsenal.
>
> Mr. Cabell. It is not just a wrist-slapping thing. You will retain that action.
>
> Secretary Connor. Yes, sir.

Id. at 26-27. *See also* H.R. Rep. No. 434, 89th Cong., 1st Sess. 4-5 (1965).

In addition, the legislative history of the 1965 amendments indicates a keen desire on the part of Congress to spell out precisely those powers granted by the amendments, and a reluctance to leave important matters to "implication". Thus, the Senate report on H.R. 7105 contains the following statement:

> Section 2 of the bill amends section 5 of the act to authorize the administrative imposition of a civil penalty not exceeding $1,000 for any violation of the

act or any regulation, order, or license issued under it. The bill differs from the bill originally proposed by the Department of Commerce in two major respects. First, the Commerce Department bill would have left to legal implication the power to collect a fine by means of the administrative sanction of withholding or suspending export licenses or privileges until the fine is paid. Under existing law, licenses may be revoked for any infraction, and the imposition of a fine would normally be a milder sanction. *However, the legal power to confront an offender with the alternative of either paying the monetary penalty or losing his license is too important a feature of the statutory scheme to be left to implication.* It is also desirable to limit to a maximum of 1 year the period for which export privileges may be withheld as a means of collecting a penalty. The monetary penalties authorized by this bill are not intended to deal with serious and flagrant violations.

The other major change from the original proposal in the civil penalty provisions is to clarify the rights of persons who wish to contest in court the imposition of any such penalty. In the case of a person who does not pay the penalty, either voluntarily or to prevent the suspension of his export privileges, the bill provides that the Government may collect only by a civil action in which the court is to determine de novo all issues necessary to the establishment of liability. *It is possible that the courts might have reached this result under the language of the originally proposed bill providing that the "amount of any penalty * * * shall be recoverable in a civil suit in the name of the United States," but this is by no means certain.*

Senate Rep. No. 363, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Adm. News 1826, 1831 (emphasis added). Certainly one would think that a private right of action is at least as important to the statutory scheme as

"the legal power to confront an offender with the alternatives of either paying the monetary penalty or losing his license", and, if intended, would have similarly "not be[en] left to implication".

The Export Administration Act sets forth a detailed regulatory scheme for enforcement of its provisions. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage to subsume other remedies". *Amtrak*, 414 U.S. at 458. We believe this principle is applicable here. Finding no legislative intention to provide a private right of action under the Export Administration Act, we grant defendants' motion to dismiss this claim.

III. The RICO Claim

Plaintiff's fourth claim alleges a violation by defendants SOTC and SII[5] of the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 et seq. (1976). Defendants move to dismiss the claim on the grounds that plaintiff has failed to allege a connection on their part to "organized crime", and has failed to allege an injury from "racketeering activity".

RICO makes it unlawful for any person to engage in certain "racketeering activities" or to conspire to do so. 18 U.S.C. § 1964 provides for civil remedies. Section 1964 (c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States

5. The complaint uses the general term "defendants" in discussing the RICO violation (*see, e.g.*, ¶ 87), however, no mention of defendant SII appears in allegations made with respect to that claim.

district court and shall recover the threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Congress' self-declared purpose in enacting RICO was "to seek the eradication of organized crime in the United States". *United States v. Turkette*, 452 U.S. 576, 589 (1981) (quoting 84 Stat. 923). On the basis of the statute's legislative history, several judges in this district have concluded that a complaint under the civil provisions of RICO must allege a link between the defendants and organized crime. *See, e.g., Minpeco, S.A. v. Conticommodity Services, Inc.*, 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983) (Lasker, J.); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (Knapp, J.); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (MacMahon, J.). *Contra, Hellenic Lines v. O'Hearn*, 523 F. [Supp.] 244, 247 (S.D.N.Y. 1981) (Duffy, J.). Although we have no doubt that Congress did not intend "to create a private right of action for treble damages for violations of substantive statutes by ordinary business or parties", *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983), we are reluctant to read an "organized crime" requirement into the civil statute given the constitutional problems that would be raised by such a requirement in the criminal context. *See Bankers Trust Co. v. Feldesman*, No. 82 Civ. 5790 (WCC), slip op. at 6 (S.D.N.Y. June 29, 1983) (available on Lexis, Genfed library, Dist file) (citing 116 Cong. Rec. 35204 (1970) (remarks of Congressman Poff). We also note the problems inherent in the task of defining "organized crime". *Cf. Minpeco, S.A.* 559 F. Supp. at 1351. ("It is unnecessary to attempt at this point to specify a definition of organized crime. Minpeco has not alleged any link between the defendants and organized crime, by any definition.")

We do agree with defendants, however, that to state a claim for damages under civil RICO, a plaintiff must do more than simply allege performance of at least two predicate acts listed at 18 U.S.C. 1961(1) within a ten year period. Section 1964(c) grants standing to any person injured "by reason of a violation of section 1962 of this chapter". "Unless these words have no effect, they can only mean that the plaintiff's injuries must derive from the 'pattern of racketeering activity' which violates section 1962 rather than directly from the underlying acts which combine to constitute that pattern." *Bankers Trust Co.*, slip op. at 7. *See also Richardson v. Shearson/American Express Co.*, Fed. Sec. L. Rep. (CCH) ¶ 99,145 at 95,525-26 (S.D.N.Y. April 13, 1983); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983). We thus consider whether plaintiff has alleged an injury "by reason of a violation of section 1962".

Section 1962 provides in relevant part:

> Prohibited activities
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest to, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or

> indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Plaintiff has not alleged any injury by virtue of section 1962(a). That is, plaintiff has not claimed that it was injured by defendants' investment of any income derived from their alleged "pattern of racketeering activity".[6] Nor has plaintiff alleged injury through a violation of section 1962(b)—the acquisition of an interest in any enterprise through a pattern of racketeering activity. The determination of whether plaintiff has alleged injury by virtue of section 1962(c), however, requires a more detailed analysis of that section's terms.

Section 1962(c), by its terms, applies to "persons" who are "employed by or associated with any enterprise" and who participate in the conduct of that enterprise's affairs "through a pattern of racketeering activity". "Persons" under RICO include individuals and entities

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6. A "pattern of racketeering activity" under the statute is "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity". 18 U.S.C. § 1961(5). A "racketeering activity" is one of the many predicate acts (which include extortion as alleged in this complaint) set forth at 18 U.S.C. § 1961(1).

capable of holding interests in property. 18 U.S.C. § 1961(3). An "enterprise" under the statute includes:

> any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

As can be seen, section 1962(c) "clearly envisions a relationship between a 'person' and an 'enterprise' as an element of the offense which [it] proscribes and for which 1964(c) would subject the 'person' to treble damages". *Van Schaik v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982). *See also Bennet v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982); *Eaby v. Richmond*, 561 F. Supp. 131, 134 (E.D. Pa. 1983); *Parnes v. Heinold Commodities, Inc.*, 549 F. Supp. 20, 23-24 (N.D. Ill. 1982). *But cf. United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815 (1983) (corporation may be both criminal defendant and enterprise); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 232-33 (M.D. Pa. 1982) (enterprise may be named a civil defendant when alleged to have been operated by directors and controlling partners through a pattern of racketeering activity).

In this case, plaintiff has not made clear in its complaint who is the person sought to be held liable for participating in the conduct of what enterprise. Indeed, it appears that plaintiff considers "person", "enterprise", and "pattern of racketeering activity" all to be synonymous for the purposes of the statute. We do not believe such a loose reading of the statute is warranted, particularly when the potential for abuse of the statute in light of its purpose is considered. More significantly, however, we find that as pleaded, the complaint does not state a claim of injury from violation of section 1962(c) no matter who is considered

the person or the enterprise. If, for example, one considers SOTC and SIL collectively "the enterprise", then plaintiff has named no person employed by or associated with that enterprise whose conduct caused them injury. Alternatively, if one considers SOTC as the enterprise and SIL the person "associated with" SOTC, then plaintiff has not pleaded a "*pattern* of racketeering activity" on SIL's part since SIL is alleged to have participated in only one predicate act, namely, the wrongful attachment of Bulk (Milano)'s property. Finally, if SIL is the enterprise and SOTC the person, plaintiff has not alleged SOTC's "participation . . . in the conduct of such enterprise's affairs *through* a pattern of racketeering activity" since, again, SOTC apparently acted alone in ordering oil from Bulk (USA) without the intention of paying. As was explained in *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981):

> one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise, or (2) the predicate offenses are related to the activity of that enterprise. Simply committing predicate offenses which are unrelated to the enterprise or one's position within it would be insufficient.

Finally, plaintiff has not stated a claim of injury under section 1962(d) since it does not allege any conspiracy to violate sections (a), (b) or (c).

IV. The Wrongful Attachment Claim

As we have indicated to the parties in our letter of August 8, 1983, we are unable to decide defendants' motion to dismiss this claim without briefing on the issues of which

jurisdiction's law applies, and whether plaintiff's claim is legally sufficient under that law. Accordingly, we defer decision on this point pending receipt of further briefs on these issues.

V. Summary

Plaintiff's claims under the Sherman Act, the Export Administration Act and RICO are dismissed. Decision on plaintiff's wrongful attachment claim is deferred as indicated in section IV above.

So Ordered.

/s/ Charles E. Stewart, Jr.
United States District Judge

Dated: New York, New York
August 11, 1983

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

I. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

* * * *

II. The Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (Supp. V 1981), provides in pertinent part:

§ 2407. *Foreign boycotts*

(a) Prohibitions and exceptions

(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act [section 2402(5) (A) or (B) of this Appendix], the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country,

with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

* * * *

§ 2410. *Violations*

* * * *

(c) Civil penalties; administrative sanction

(1) The head of any department or agency exercising any functions under this Act [sections 2401 to 2420 of this Appendix], or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $10,000 for each violation of this Act [section 2401 to 2420 of this Appendix] or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix], either in addition to or in lieu of any other liability or penalty which may be imposed, except that the civil penalty for each such violation involving national security controls imposed under section 5 of this Act [section 2404 of this Appendix] or controls imposed on the export of defense articles and defense services under section 38 of the Arms Export Control Act [section 2778 of Title 22] may not exceed $100,000.

(2) (A) The authority under this Act [sections 2401 to 2420 of this Appendix] to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix].

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act [sections 2401 to 2420 of this Appendix] for a violation of the regulations issued pursuant to section 8(a) of this Act [section 2407 (a) of this Appendix] may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of this Act [section 2407(a) of this Appendix] shall be made available for public inspection and copying.

(d) Payment of penalties

The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed. In addition, the payment of any penalty imposed under subsection (c) may be deferred or suspended in

whole or in part for a period of time no longer than any probation period (which may exceed one year) that may be imposed upon such person. Such a deferral or suspension shall not operate as a bar to the collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

(e) Refunds

Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within 2 years after payment, on the ground of a material error of fact or law in the imposition of the penalty. Notwithstanding section 1346(a) of title 28, United States Code [section 1346(a) of title 28], no action for the refund of any such penalty may be maintained in any court.

(f) Actions for recovery of penalties

In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon by the United States in any way unless it has previously been reduced to judgment.

(g) Other authorities

Nothing in subsection (c), (d), or (f) limits—

(1) the availability of other administrative or judicial remedies with respect to violations of this Act [sections 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix];

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act [section 2401 to 2420 of this Appendix], or any regulation, order, or license issued under this Act [sections 2401 to 2420 of this Appendix]; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)) [section 401(b) of Title 22].